

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

LAMOUNT AUSTIN,

Plaintiff,

v.

No. 16cv58 KG/LF

EVERBANK, et al.,

Defendants.

**MEMORANDUM OPINION AND ORDER GRANTING MOTION TO RECONSIDER**

**THIS MATTER** comes before the Court on Plaintiff's Request to Reconsider, Doc. 8, filed February 23, 2016. For the reasons stated below, the Court will **GRANT** Plaintiff's Request to Reconsider and **VACATE** the Order of Dismissal, Doc. 6, and Final Order, Doc. 7. Plaintiff shall comply with the Court's Order to Cure Deficiency, Doc. 5, within fourteen (14) days of entry of this Order. Failure to do so may result in dismissal of this case.

Plaintiff filed an Application to Proceed in District Court Without Prepaying Fees or Costs (Long Form). *See* Doc. 2 ("Application"). The Court found Plaintiff's Application to be deficient because Plaintiff did not properly answer the questions in the Application. *See* Order to Cure Deficiency, Doc. 5, filed January 27, 2016. The Court granted Plaintiff fourteen (14) days to either file an amended application or pay the \$400.00 fee to initiate this case, and notified Plaintiff that failure to timely file an amended application or pay the \$400.00 fee may result in dismissal of this case without prejudice.

Plaintiff did not comply with the Court's Order to timely file an amended application or pay the \$400.00 fee. The Court denied Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs (Long Form), Doc. 2, and dismissed this case without prejudice for failure to comply with the Court's Order to timely file an amended application or pay the

\$400.00 fee. *See* Order of Dismissal, Doc. 6, and Final Order, Doc. 7, both filed February 17, 2016.

On February 23, 2016, Plaintiff filed his Request to Reconsider. Plaintiff acknowledges that he was notified of the Order to Cure Deficiency but “mistakenly thought,” due to “not reading more carefully,” the notice concerned another case of his in which he recently cured the application defect.<sup>1</sup>

The Court construes Plaintiff’s Request to Reconsider as a motion for relief from final judgment pursuant to Fed. R. Civ. P. 60(b). Rule 60(b)(1) allows the Court, on motion and just terms, to relieve a party from a final judgment or order for “mistake, inadvertence, surprise, or excusable neglect.” *See Zimmerling v. Affinity Financial Corp.*, 478 Fed.Appx. 505, 508 (10th Cir. 2012) (“To set aside a default judgment under Rule 60(b)[1], the moving party must show that its ‘culpable conduct did not cause the default,’ that it ‘has a meritorious defense,’ and that ‘the non-moving party will not be prejudiced by setting aside the judgment.’ *United States v. Timbers Preserve*, 999 F.2d 452, 454 (10th Cir.1993). A party ‘will be considered culpable only if the party defaulted willfully or has no excuse for the default.’ *Id.*”).

The Court will grant Plaintiff’s Request to Reconsider because: (i) Plaintiff’s mistake appears to be simple negligence rather than culpable conduct; (ii) Plaintiff sought relief from the Court’s Order of Dismissal and Final Order within six days of entry of those Orders and, thus, did not cause significant delay; (iii) Defendants will not be prejudiced because this case was recently filed on January 26, 2016, and because Defendants have not yet been served process; and (iv) because the Court dismissed this case without prejudice, Plaintiff could simply file a new case if the Court does not grant his Request to Reconsider. Plaintiff shall comply with the Court’s Order

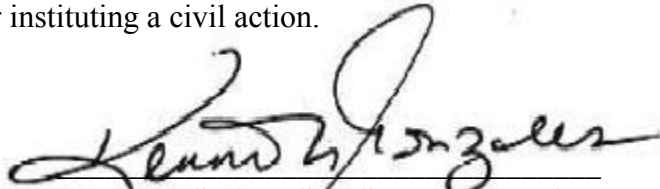
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<sup>1</sup> On January 26, 2016, Plaintiff complied with an Order to Cure Defect by paying the filing fee in *Austin v. Select Portfolio Servicing*, No. 16cv17 MV/KBM, *see* Doc. 6.

to Cure Deficiency, Doc. 5, within fourteen (14) days of entry of this Order. Failure to do so may result in dismissal of this case.

**IT IS ORDERED** that Plaintiff's Request to Reconsider, Doc. 8, filed February 23, 2016, is **GRANTED**.

**IT IS ALSO ORDERED** that Plaintiff shall, within fourteen (14) days from entry of this order, either file an "Application to Proceed in District Court Without Prepaying Fees or Costs (Long Form)" or pay the \$400.00 fee for instituting a civil action.



**UNITED STATES DISTRICT JUDGE**